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Nancy M. Morris, Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N. E.  
Washington, D.C. 20549-1090

Re: File No. S7-12-01/Press Release No. 34-52405

Dear Secretary Morris,

Proposed Regulation B contains several issues originating in the Congressional enactment of the Gramm-Leach-Bliley Act and its reform of the Glass-Steagall Act. Most importantly, Gramm-Leach-Bliley and Glass-Steagall delineate the imposed separation of the commercial banking and investment banking sectors of the American economy and revise the restrictions and prohibitions these sectors had been laboring under. Proposed Regulation B will be required to demonstrate the manner in which the Commission is capable of implementing Glass-Steagall and Gramm-Leach-Bliley to provide for the enhanced market integration that has taken place safely under the current regulation in place since the enactment of Glass-Steagall in 1933 and also further guide such market integration. Specifically, I wish to comment upon the Gramm-Leach-Bliley provisions permitting banks to offer referrals to broker-dealer services to their traditional bank customers, the fee structures Regulation B imposes upon these services, and most notably, the manner in which traditional political theory aids in interpreting the definition of “referral.”

Section 17 C.F.R. 242.710 (c) of proposed Regulation B defines “referral” as “the action taken by a bank employee to direct a customer of the bank to a registered broker or dealer for the purchase or sale of securities for the customer’s account.” This definition of referral maintains the generality of the Gramm-Leach-Bliley definition of referral found at 15 U.S.C. 78c(a)(4)(B)(i)(IV), (V) & (VI). There does not appear to be a

rational for imposing a more narrow regulatory definition upon the definition of referral. A potential conflict of interest would be in the new found structuring permitting a dual employee system permitted in the Gramm-Leach-Bliley's repeal of sections 20 and 32 of the Glass-Steagall Act. The conditions imposed within section 242.710 of proposed Regulation B upon bank compensation of bank employees for said employees referrals of bank customers to broker-dealers are traditional safeguards to insure the absence of a conflict of interest on the part of the employee in determining the interests of the bank's customers when providing the referral under a third party arrangement. This new structuring provides regulatory guidance in permitting any bank to engage in third party arrangements from those completely independent of overlapping employees wherein sheer advertisement of broker-dealers to appeal to bank customers is a concern and thus poses a distraction from traditional banking services to those with completely overlapping broker-dealer services with only independent and separate corporate organizational forms with same personnel effectuating the transactions.

The nature of the compensation of bank employees for referrals could determine the extent of concern. Nothing in the regulation prohibits dual payment for self-referrals by banking employees. It is unlikely that the nature of referral fee compensation of bank employees under Regulation B could moderate the perceived conflict of interest resulting from dual employment. Presumably, intrabank discipline would determine this given the number of employees involved in any given bank location in a larger bank or, in a smaller bank also, where customers could suddenly be offered full services by bank employees. Similarly, compensation for trust and fiduciary activities distinct from the manner of compensation of bank employees for referrals thus does not lessen this debate over the regulatory obligation in the absence of sections 20 and 32 of Glass-Steagall prohibition upon sharing employees. The manner of determining chiefly compensated as well as the requirement of chiefly compensated does reinforce the distinction between the functions of the commercial bank and the investment bank. Money managing is unavoidable in the commercial bank, avoiding the primary purpose of speculative investment is a divining line in distinguishing the propriety of the exemption for broker-dealer status.

The primary concern in the regulation of on premises broker-dealer services and third-party arrangements generally is the avoiding of both bank employee and bank customer confusion. Given the horizontal and vertical affiliation created under the Gramm-Leach-Bliley Act while the legally and functionally distinct nature of the commercial bank and Federal Reserve System have been retained in the provisions of sections 16 and 21 of the Glass-Steagall Act, which prohibit bank sale of securities and thus investment bank functions by commercial banks, one must look to governing theory to avoid confusion. The interpretive debate over the divide between commercial and investment banking must derive its basis in light of various colonial era themes preceding and following the ratification of the American constitution. Commercial bank employee discretion in providing securities investment referrals under the Gramm-Leach-Bliley Act should be determined in light of general fundamental legal theory of the right of the individual and the due and proper purpose of legal principles.

As previously discussed, the newly conferred commercial bank powers enumerated in the Gramm-Leach-Bliley Act, once known as the Financial Services Modernization Act of 1999, allow commercial banks to provide retail bank customers with very specific product recommendation as to both their securities investments and insurance referrals. These commercial bank powers consummate and generate, and thus self-actualize, an interesting reform in the political ideology of capitalism in modern, democratic society.<sup>1</sup>

Over the course of the centuries of the United States' existence, principles of democratic government have presupposed individual ability to administer personal relationships and this consequent, relative personal administering of relationships has increased popular access to information and the creation of formalized systems. Retail commercial banking in the United States is a cornerstone of democracy in a sizable land mass republic the mere size of which requires that numerous members of the populace be permitted access to a payment, credit system affording both large institutions and industrialization as well as the economies of scale enjoyed by the citizen consumer. The size of the aggregate commercial bank economy in the United States arose from increasingly more secure payment and credit systems subject to both public and private control. This security and consequent reliability foster both the dependency of depositors and assuage popular passions and prejudices in the use of transactional markets, recognizing the capitalistic nature of the typical commercial bank.

Although the Gramm-Leach-Bliley Act speaks in terms of referring bank customers to broker-dealers the very nature of the discretion inherent in categorizing the different brokers and parallel customers and who is referred to whom is, in essence, permitting the commercial bank to review, selectively filter, and proffer a selected securities investment to the ordinary depositor, with whom a relationship based upon expertise has existed, does evoke concern as a providing of investment advice. The business of commercial banking in the United States, however, has evolved by virtue of tradition and circumstance into, and remains, a relatively conservative institution. It is, to quote Alexis de Tocqueville, "more attached to principles than to consequences,"<sup>2</sup> "to generalities rather than to particular cases,"<sup>3</sup> and "to ideas rather to personalities."<sup>4</sup> It

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<sup>1</sup> "For over a decade, the Committee has been concerned that the statutory framework governing financial services has become outdated. Many of the statutes addressing financial services, dating from the Great Depression or even earlier, are not well adapted to the changes taking place in the financial services industry. In particular, developments in technology, globalization of financial services, and changes in the capital markets have rendered the laws governing financial services unsuitable and outdated in many respects." S. Rep. No. 106-44, at 3 (1999) of the U.S. Senate Committee on Banking, Housing, and Urban Affairs.

<sup>2</sup> Alexis de Tocqueville, *Democracy In America*. Originally published in 1840. Trans. George Lawrence, ed. J. P. Mayer (Garden City, N.Y.: Anchor Books, Doubleday & Company, Inc., 1969), 175.

<sup>3</sup> *Ibid.*, 175.

<sup>4</sup> *Ibid.*, 175.

embodies this incongruity of an expression of popular power never feared. Obligatory methods of guarantying the administrability of payment streams and the development of commercially viable financial products rests intrabank evaluation and selection, wheat from chaff, of securities investments as a new found, nonbank power upon long-tested commercial bank method and practice.

The nongovernmental, publicly held nature of commercial bank stock ownership is a blend of the lesser-regulated investment bank and the more highly regulated and governmentally controlled central bank. The monopoly incumbent within full, faith, and credit governmental central banking and fiscal standards yields to a popularly imposed, regulatory scheme permitting profitability based upon broad based bank product creation that is tempered below that of the relatively, more profit orientated unilateralism of the investment bank. The relationship of a commercial bank and a prospective securities investor relative to the relationship of a prospective securities investor and an investment bank is one of the autarky afforded commercial bank customer decision making versus the usurpation afforded investment bank customers, absent the noninvolvement of the governmental central bank, but both relationships are governed by a threshold standard of investor protection. This threshold de Tocqueville would term the self-governance of the investor facilitated by a “capacity to choose between the different opinions ... and to appreciate the various facts which may guide his judgment.”<sup>5</sup>

The commercial bank would be thought the purveyor of more routine, conservative investment advice when proffered by a given bank teller or assistant manager whether orally or in a standard, periodic written form approved by a central office with permitted fees accruing and properly disclosed. The differing and relatively idiosyncratic expertise of the commercial and investment banks one would imagine would not be undermined or compromised by this competition and consequently also not the resulting nature and scope of the relative type of investment advice given. A less sophisticated investor, as a longstanding commercial bank depositor and less frequent securities investor, would be potentially the first privileged and aided by access to securities investment advice within a well-known environment and in a comfortable form.

The governing principles providing and guarantying the safety and soundness of such commercial bank services embody de Tocqueville’s belief that “[d]emocratic government makes the idea of political rights penetrate right down to the least citizens, just as the division of property puts the general idea of property rights within reach of all.”<sup>6</sup> The consequent “[e]quality of conditions does not by itself alone make mores strict, but there can be doubt that it aids and increases such a tendency [but one would presume its ability to do so].”<sup>7</sup>

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<sup>5</sup> Ibid., 181.

<sup>6</sup> Ibid., 239.

<sup>7</sup> Ibid., 595 (emphasis added).

Individuals in democracies are very weak, but the state, which represents the all and holds them all in the palm of its hand, is very strong. Nowhere else do the citizens seem smaller than in a democratic nation, and nowhere else does the nation itself seem greater, so that it is easily conceived as a vast picture.<sup>8</sup>

These essential principles created our American system and are relied upon today with respect to matters both fundamental and those derivatively and deductively complex such as the governance of financial services and investment markets.

Reconciling de Tocqueville with the modern view of Roberto Mangabeira Unger that legal standards presuppose an ideology, one would ask in the words of Unger, how “a view of society ... informs a practice of politics”<sup>9</sup> and further how this question bears upon the regulatory questions commercial bank referral services pose. The previously quoted view of de Tocqueville’s democratic society today meets with Unger’s view of legal formalism as the impossibility of a method of legal justification or practice from obviating, entirely, the possibility of unresolved “open-ended disputes” of both law and fact.<sup>10</sup> The investment referral service empowered to commercial banks exists as result of express legal formalism embodied in and envisioned by statute. Formalism, as presumably an “apolitical method of analysis,”<sup>11</sup> must look to the concerns of the average investor, whether served by commercial bank or investment bank. Economic development and profitability are both balanced with a variety of intangible, novel standards of shareholder, managerial philosophy regardless of whether geophysical, political, or historical.

The current standards governing the provision of securities investment advice do not distinguish between provision by commercial bank or investment bank. The relative economies of scale in the experience, training, and sensitivity of the given investment advisor, employee of either a commercial bank or an investment bank would probably determine the relative soundness of the advisor’s practice. Simplicity versus complexity, utility versus efficacy, and commercial development versus profitability would parallel concerns and views of world and society. Governmental regulation of both, now competing, institutions, requires, in the words of Unger, the confluence of “the law and economics and the rights and principles schools”<sup>12</sup> to a greater depth than presently

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<sup>8</sup> Ibid., 469.

<sup>9</sup> Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard University Press, 1986), 1.

<sup>10</sup> Ibid., 1.

<sup>11</sup> Ibid., 2.

<sup>12</sup> Ibid., 12.

found. Safety and soundness will continue to temper and glean from the unfettered zeal of capitalism. With approval, Unger would be found to comment that “[a] vision of transformed personal relations may serve in turn to inspire major institutional change.”<sup>13</sup>

Certain equitable considerations exist in the provision of investment referrals by commercial banks that may be drawn from a view of the market for financial services in light of traditional American legal theories of law and government and their respective proper role in commercial development. Market competition incumbent upon lending institutions as well as other financial institutions now engaging in the provision of financial services and investment advice under new federal authorizations generates interesting issues and considerations. Many similar business and financial services that have been Congressionally authorized over the years provide useful standards and methods for guiding both financial institutions and interested consumers. By way of example, the ability of commercial banks to provide ordinary consumers referrals to investment providers under the Gramm-Leach-Bliley Act, harkens back to the early debates surrounding bank consumer credit truth-in-lending compliance as well as traditional business concerns of product development, market suitability, and bank profitability. Bank customers will certainly rely upon the nature, type, format, and uniformity of referral information provided. In providing referral information, large commercial lenders operating in diverse markets will probably undertake a traditional approach to profitability that considers the local interests of communities served by its bank branches. In the words of colonial American farmer J. Hector St. John de Crèvecoeur, diversity among those of the citizenry:

proceeds from the peculiar soil and exposition in which they grow. We are nothing but what we derive from the air we breathe, the climate we inhabit, the government we obey, the system of religion we profess, and the nature of our employment.<sup>14</sup>

Each bank must seek to provide a variety of referral information that meets its concerns for fair, honest, and adequate review and selection of the investment providers to be referred to depositors, other customers, and the general public.

Traditional, profitability orientated financial services draw upon time honored, founding American principles of frugality, conservation, and industry. As Benjamin Franklin conveyed in the words putatively offered by Poor Richard:

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<sup>13</sup> Ibid., 25.

<sup>14</sup> J. Hector St. John de Crèvecoeur, *Letters From An American Farmer And Sketches Of Eighteenth-Century America* (1782 in England; reprint, edited with an introduction by Albert E. Stone, New York: Viking Penguin, Penguin Books USA Inc., Penguin Group, 1986), 71.

“Friends ... and Neighbours, the Taxes are indeed very heavy, and if those laid on by the Government were the only Ones we had to pay, we might more easily discharge them; but we have many others, and much more grievous to some of us. We are taxed twice as much by our Idleness, three times as much by our Pride, and four times as much by our Folly, and from these Taxes the Commissioners cannot ease or deliver us by allowing an Abatement. However let us hearken to good Advice, and something may be done for us; God helps them that help themselves, as Poor Richard says, in his Almanack of 1733.<sup>15</sup>

Financial service advice, regardless of by whom tendered, is structured upon the principle of efficiency in the use of time and labor thus promoting profit and human development. Referral information services rely upon an economy of scale that balances the research standards capable of large financial institutions with whom individual customers are familiar and an individual investor’s obligation to reach an informed decision. The general public now lives in an era of great personal complexity. Information and access to ordinary, necessary financial services are increasingly made more convenient by prudent and disciplined state and federal legislation. Longstanding regulatory provisions give rise to both citizen education and consequent commercial development. Overtime, compliance and debate generate a perspective on the way in which rules and procedures formerly considered appropriate might be reformed. The new financial services law provides a point of review of current method and understanding.

Customers, business collaboratives, and community residents together with a given lending institution create and produce an appreciation in value in the geographic area in which they collectively exist, the goodwill of the community in which they reside, and the future of their society. On this theme, the words of de Crèvecoeur read as if written with respect to modern, twenty-first century definitions of property:

Precious soil, I say to myself, by what singular custom of law is it that thou wast made to constitute the riches of the freeholder? What should we American farmers be without the distinct possession of that soil? ... This formerly rude soil has been converted ... and in return, it has established all our rights; on it is founded our rank, our freedom, our power as citizens, our importance as inhabitants of

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<sup>15</sup> Benjamin Franklin, “The Way to Wealth,” originally published in 1757 as the twenty-sixth and final almanac in the *Poor Richard: An Almanack* series; reprinted in *The Autobiography And Other Writings*, edited with an introduction by Kenneth Silverman (Toronto: Penguin Books Canada Ltd., Penguin Group, 1986), 215, at 216 – 217.

such a district. ... [F]or this is what may be called the true and only philosophy of an American farmer.<sup>16</sup>

In conclusion, the provision of broker and dealer referral services by commercial banks to their traditional customers must be guided by the traditional distinction between commercial and investment banks. The manner of compensation of bank employees will do little to underscore this definition in light of the repeal of sections 20 and 32 of the Glass-Steagall Act. Rather, the inherent relative conservatism of the commercial bank must be relied upon to remind bank employees, including those affiliated with those with whom the bank has a third party arrangement, of their fiduciary duty toward bank customers. Permitting banks to transit to a provision of financial services which come closer to those provided by the securities market place imposes an obligation on the commercial banks to review and rely upon the information they obtain in the marketplace. Shared information services, when adequately governed, incrementally develop the unknown into the basis of valued property in the form of profitable investments, greater efficiency in commercial productivity, and an appreciation in real property values. Review and development of information converts the formerly not understood into a precious commodity representing knowledge, understanding, and the advance of community and civilized structuring. In the spirit of J. Hector St. John de Crèvecoeur and Benjamin Franklin, the structural process and the perspectives on asset development and appreciation given forth by referral information services become the basis for informed choice and consumer wealth, rights, freedom, and power.

Sincerely,

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<sup>16</sup> de Crèvecoeur, *Letters From An American Farmer And Sketches Of Eighteenth-Century America*, 54.



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